INDEX.

PETITION FOR WRIT OF CERTIORARI..... 1

Statement of the Matter Involved..... 1

Question Presented 6

Reasons for Allowance of the Writ..... 7

Jurisdiction 8

Prayer for Relief..... 8

BRIEF IN SUPPORT OF PETITION..... 9

Statement of Facts..... 9

Argument 12

Respondents Should Be Held Accountable..... 12

Accounting Does Not Reopen Reorganization Plan 15

Petitioner's Claim Is Not *Res Adjudicata*..... 15

Opinions Below 16

Conclusion 16

AUTHORITIES CITED.

Cases.

Meinhard v. Salmon, 249 N. Y. 458..... 14

Pepper v. Litton, 308 U. S. 295..... 13

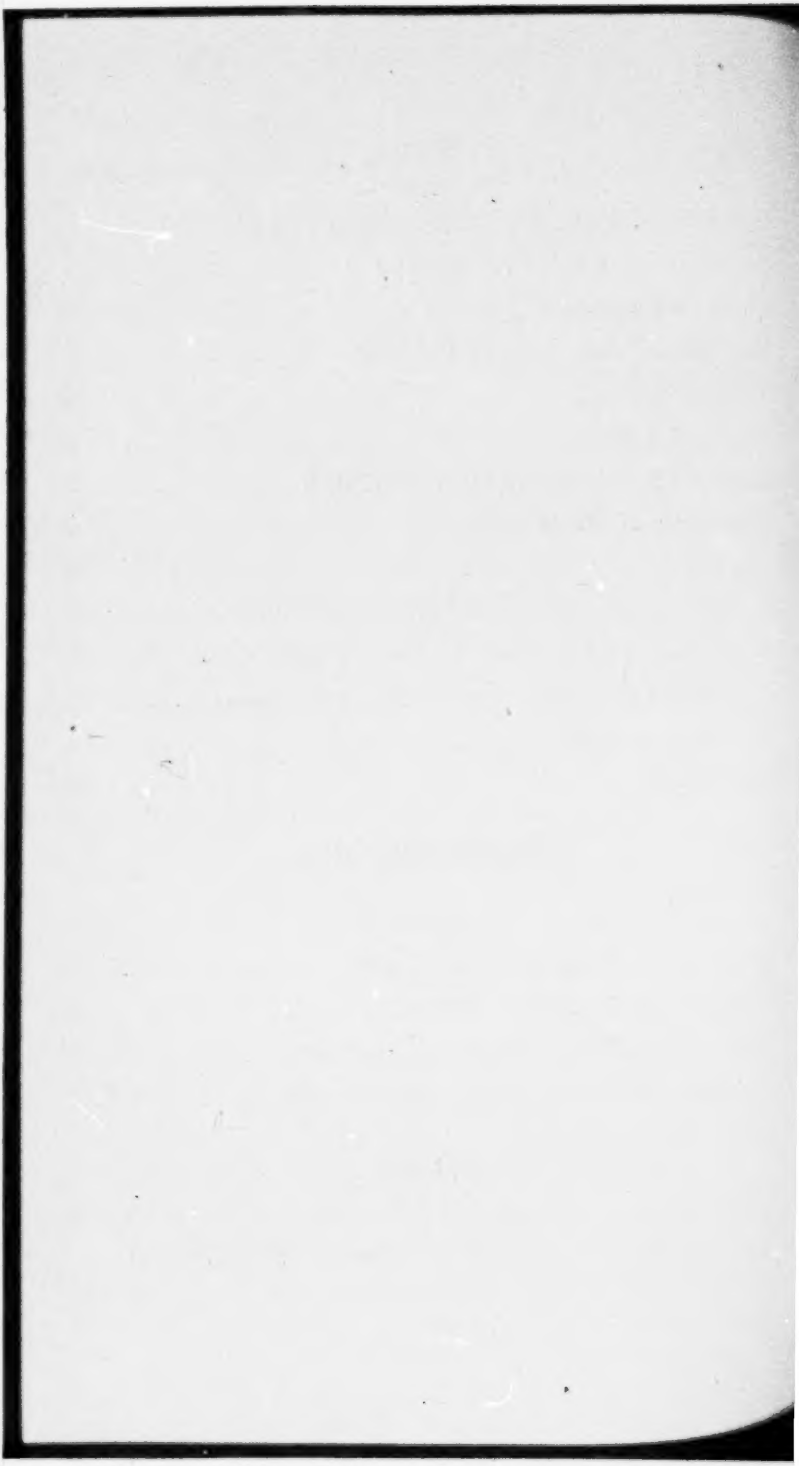
Young v. Bradley, et al., 142 F. (2d) 658.....15, 16

Young v. Higbee Co., et al., 324 U. S. 204.....3, 7, 12

Statutes.

Bankruptcy Act, Chapter X.....1, 6, 9

Judicial Code, Section 240 as Amended (Title 28 U. S. C. A. Sections 347, 350)..... 8



In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. . . . . .

In the Matter of
THE HIGBEE COMPANY,
Debtor.
} BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,
Petitioner,
v.
JOHN P. MURPHY and
GERTRUDE BAKER BRADLEY and ALVA BRADLEY,
Executors of the Estate of Charles L. Bradley, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and the Associate Justices of the United States:

Petitioner, Robert R. Young, hereby petitions for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, whose judgment of December 2, 1947 affirmed the judgment below.

STATEMENT OF THE MATTER INVOLVED.

This controversy arises out of the corporate reorganization proceedings of The Higbee Company pursuant to Chapter X of the Bankruptcy Act. Petitioner is now and was, at the time of the transaction involved, a stockholder of The Higbee Company, Debtor.

At the times complained of herein, Charles L. Bradley was living. For convenience, we will refer to John P. Murphy and Charles L. Bradley as the respondents, rather than Murphy and the executors of Bradley's estate.

In June, 1937, Bradley and Murphy purchased from Ball Foundation for $60,000 cash and their limited liability note for $540,000, certain claims against and securities of The Higbee Company (R. 30). The claims were a participation in Higbee's Senior Bank Indebtedness and all of Higbee's Junior Indebtedness. The securities were the entire issue of common stock. Later, under the Plan of Reorganization, respondents received the avails of these Higbee securities. Briefly they were: $69,673.71 in cash, $600,000 of new Higbee 4% notes (since paid in full) and about 51% of the new Higbee common stock. At the time of this purchase, Bradley was a director of Higbee. Murphy became a director a month later (R. 119, 121). Shortly afterwards Bradley was elected president. Higbee had been in bankruptcy reorganization proceedings since August, 1935. The debtor was in possession of its property (R. 98). Bradley retained his official position until his death on December 18, 1943 (R. 43, Paragraph 6 (c)). Thereafter, Murphy became president. He still holds that office.

In 1941, the District Court entered a judgment confirming the Plan of Reorganization for Higbee which awarded to Bradley and Murphy the Higbee securities (R. 136). Prior to that time, some of the Higbee shareholders had objected to respondents' obtaining so large an award from the reorganization and had questioned the propriety of officers of the debtor company dealing for their personal gain in the bankrupt's obligations and securities (R. 93, 133).

J. Fred Potts and William W. Boag between them owned 260 shares of the old preferred stock of Higbee. They were members of a Preferred Stockholders Committee. Potts was also the attorney for the committee.

They had appealed on behalf of all said stockholders to the Sixth Circuit Court of Appeals from the order of the District Court confirming the Higbee Plan of Reorganization (R. 141). Before the Circuit Court heard the appeal, Bradley and Murphy, on March 7, 1942, bought the 260 shares of stock owned by Potts and Boag, together with the "right" to dismiss the appeal (R. 44, 45). They paid $115,000.00 for stock worth about $17,000.00 on the market (R. 7). Bradley and Murphy forthwith caused the dismissal of the appeal and consequent final confirmation of the Plan of Reorganization (R. 14). In that manner, respondents, while holding official positions in the debtor company, removed the risk of losing all or part of the new Higbee securities which under the Reorganization Plan were awarded to them personally.

Petitioner contends that this transaction is wrongful because it was done for personal advantage by persons occupying a fiduciary capacity, thereby depriving their beneficiaries, Higbee stockholders, of a legal adjudication which, if successful, would award the beneficiaries a substantial sum (R. 121). In this case petitioner sought an order requiring respondents to account to all the shareholders of Higbee for what respondents had gained as a result of their purchase and consequent dismissal of the Potts and Boag appeal (R. 2). The District Court held that respondents need not account for their personal gain (R. 279). The avails to respondents at the time of hearing the instant case in the District Court, had a market value of $3,637,475, calculated at per share prices stipulated by counsel for respondents (R. 41, 42). The Circuit Court affirmed the District Court (R. 289).

In earlier litigation in these same reorganization proceedings (*Young v. Higbee Co., et al.*, 324 U. S. 204 (R. 5)), the Supreme Court reversed the lower courts to hold Potts and Boag accountable to Higbee preferred stockholders

for what they had gained (less than $100,000.00) as a result of their part in this same wrongful transaction.

The Higbee reorganization plan has been finally confirmed by proper legal authority and is in operation. In the courts below, petitioner affirmatively stated that he was not attempting to reopen the reorganization plan. Nevertheless, the Circuit Court has determined that to require respondents to account for their personal gains, derived from trafficking in Higbee securities while in bankruptcy and while they held official positions in the debtor company, would necessarily have that effect. In its opinion in this case, the Circuit Court said (R. 290, 291):

> "It is obvious that to grant the relief sought by Young would require the setting aside of the plan of reorganization of The Higbee Co. confirmed by the district court whose judgment was affirmed on appeal by this court."

Notwithstanding this statement by the Circuit Court, the fact is clear that the District Court's judgment was "affirmed" only in the sense that it was allowed to stand as a result of the dismissal of the appeal. That judgment was never affirmed after consideration. And, since the consideration was prevented by the wrongful act of respondents in buying the appeal, they should be estopped to receive any benefit from the contention that the confirmation of the Reorganization Plan was a final adjudication of the issue raised by this case.

Furthermore, the petition did not ask to set aside the Plan of Reorganization, nor did it ask for any change whatsoever in that Plan except that the New Higbee securities allowed by the Plan to Bradley and Murphy, in excess of their cost of acquisition, should be decreed to be held in trust for the benefit of all stockholders (R. 3, 4).

The accounting prayed for in the petition is supported by two considerations. Potts and Boag brought an appeal concerning the Reorganization Plan for the benefit of all

stockholders, and thereby placed themselves in a fiduciary position, as has already been held by the Supreme Court. This position they could sell only subject to those obligations. But even had Potts and Boag been free to deal with the stock and the appeal as they pleased, the very acquisition of these rights by Bradley and Murphy imposed a trust because of their position as officers and directors of the debtor in possession of its property in reorganization proceedings.

This action was commenced by petitioner in a representative capacity for the benefit of all Higbee stockholders (R. 2). The Circuit Court did not pass on the merits of this petition because it erroneously held that there had been an adjudication of the same issues between the same parties. It used the following language (R. 291, 292):

> "Young and his associate, Kirby, appealed from the final judgment entered in this case on March 16, 1943. On April 21, 1944, this court affirmed that judgment. See *Young v. Bradley,* 142 F. (2d) 658 (C. C. A. 6). It would seem to be unnecessary and inappropriate to repeat here what was said in that opinion. As we see it, the present petition of Young seeks to reopen a matter already finally adjudicated against him in the previous opinion and decree of this court, affirming that of the district court. There has been an adverse final judgment entered against him on the same issues and questions which Young presents by his present petition. There is no difference in the alignment of the parties; Young on the one side; Bradley and Murphy on the other."

The earlier litigation referred to was commenced by Young and Allan P. Kirby about June 3, 1941, by filing proofs of claim in these proceedings (R. 56, Paragraph 4). Midamerica Corp. (the name of which was later changed to Terminal & Shaker Heights Realty Co.) and Frank F. Kolbe were also claimants in that controversy. But what gave rise to the present action, namely the purchase by respondents

of the "right" to dismiss the Potts and Boag appeal, did not occur until nine months after that date.

In the earlier case, Young, Kirby, Kolbe and Midamerica were claimants in their own right and for their own benefit. In this case, Kirby, Kolbe and Midamerica are not parties and Young claims nothing for himself, but only as a stockholder suing for the benefit of all Higbee stockholders.

In the earlier case, the petitioners sought to charge Bradley and Murphy as trustees because of their personal obligations to petitioners, and it was immaterial that respondents were officers of the Higbee Co. In the present case it is sought to enforce a trust relationship against Bradley and Murphy as officers and directors of a debtor corporation in reorganization proceedings, and their personal obligations to Young and associates are immaterial here. The Circuit Court's complete confusion of the issues presented and the relief sought in the instant case is the error of which complaint is here made.

Beyond the question involved in the above described error of the Circuit Court in deciding that Young's suit as a stockholder in a representative capacity was *res adjudicata*, because of a prior judicial determination against Young and three others, seeking for their own benefit to hold Bradley and Murphy as trustees for them with respect to the purchase of certain securities on the theory that respondents owed a personal fiduciary obligation to the claimants, the issue may be stated in a single paragraph:

QUESTION PRESENTED.

Should corporate officers and directors who purchased securities of their corporation while it was a "debtor in possession" in Chapter X reorganization proceedings and under their control, and who protected their position under a reorganization plan which allowed them large profits by buying the stock of persons who had ap-

pealed from the District Court order approving the plan and then dismissing the appeal, thereby making the plan effective, be required to account as fiduciaries to all stockholders for their profits from such transactions without reopening the reorganization plan, and should the decision of the Circuit Court of Appeals that such accounting would necessitate reopening the plan be reviewed and reversed?

REASONS FOR ALLOWANCE OF THE WRIT.

This case presents a question concerning the right of officers of a company in bankruptcy reorganization to traffic in the securities of that company acquired during the course of the reorganization, and further to traffic in the reorganization proceedings themselves by buying the right to dismiss an appeal which criticized the general award in favor of the officers. The other and lesser aspect of this problem arising from the very same transaction was recognized by the Supreme Court as a question of paramount importance to the fair conduct of reorganization proceedings. We refer to the judgment of the Supreme Court and the opinion of the Court written by Mr. Justice Black in *Young v. The Higbee Co.*, 324 U. S. 204 (R. 5).

The decision of the lower courts in this case permits corporate officers to advance their own personal interests at the expense of the stockholders whom they have a general duty to protect, plus a particular duty while the company is in reorganization to use the processes of bankruptcy and the courts for the benefit of the creditors rather than for their personal gain. This subject is of paramount importance to the fair conduct of corporate reorganization proceedings.

JURISDICTION.

The jurisdiction of this Court to grant the Writ is invoked under Judicial Code Section 240 as Amended (Title 28 U. S. C. A. Section 347). The judgment of the United States Circuit Court of Appeals for the Sixth Circuit was rendered December 2, 1947, and this petition is filed within the statutory period (U. S. C. A. 350).

PRAYER FOR RELIEF.

WHEREFORE the petitioner, by his counsel, prays the issuance of a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Sixth Circuit to the end that the judgment may be reversed and for such other relief as to the Court may seem appropriate.

ROBERT J. BULKLEY,
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ROBERT W. PURCELL,
Attorneys for petitioner,
Robert R. Young.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. . . . . . .

In the Matter of
THE HIGBEE COMPANY,
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JOHN P. MURPHY and
GERTRUDE BAKER BRADLEY and ALVA BRADLEY,
Executors of the Estate of Charles L. Bradley, deceased,
Respondents.

BRIEF IN SUPPORT OF PETITION.

STATEMENT OF FACTS.

The Higbee Company, a large department store in Cleveland, Ohio, filed a petition under Section 77B of the Bankruptcy Act on August 9, 1935 (R. 98). It remained in bankruptcy reorganization under the jurisdiction of the U. S. District Court at Cleveland until December 1, 1942 (R. 165). The Securities and Exchange Commission made an extensive report on the proposed Plan of Reorganization of Higbee (R. 96). This disclosed a capital structure as of January 31, 1941, of a total Senior Indebtedness amounting to $1,439,000, a Junior Indebtedness of $1,952,000, first preferred stock of $1,878,000, second preferred stock of $783,000 and 100,000 shares of common stock (R. 99).

In 1937, Bradley and Murphy purchased from the George and Frances Ball Foundation a participation in the Senior Indebtedness in the amount of $69,673.71, the entire Junior Indebtedness and the entire issue of common stock. They agreed to pay $600,000 for these Higbee securities. They did pay $60,000 cash and executed a note to the Ball Foundation for the balance (R. 231, paragraph 11), collectible only out of the collateral and carrying no personal liability of the makers. Shortly thereafter, Bradley became president and Murphy was elected a director of Higbee.

In exchange for the Higbee securities which Bradley and Murphy had purchased from the Ball Foundation, the Reorganization Plan allotted Bradley and Murphy the full participation of $69,673.71 in the Senior Indebtedness to be paid in cash, $600,000 of new 4% notes and 51% of the new common stock (R. 102). At this time respondents had a total cash investment of only $60,000 in the Higbee securities, offset by the collection of $69,673.71 in cash. The note to the Ball Foundation in the sum of $540,000 was still unpaid, but carried no personal liability of the makers.

This very liberal award to the respondents who had "devoted their time and effort to * * * the development of a Plan of Reorganization * * *" (R. 232, paragraph 14), naturally caused some of the preferred stockholders to object. The Potts and Boag appeal on behalf of preferred stockholders against the confirmation of the Plan complained that the Ball Foundation had paid only $100,000 when it purchased the Higbee securities; that respondents had agreed to pay only $600,000 when they bought the securities from the Ball Foundation; and, that the Junior Indebtedness was invalid and unenforceable (R. 134).

On March 7, 1942, when Bradley was president and a director of Higbee and Murphy was also a director (R. 13), respondents purchased from Potts and Boag for $115,000

(R. 13, 44), their 260 shares of Higbee preferred stock which had a market value of about $17,000 (R. 7). With the purchase of the stock, by the specific terms of the agreement, respondents acquired the "right" to dismiss the appeal which had been filed by Potts and Boag. On March 9, 1942, respondents filed a stipulation in the Sixth Circuit Court of Appeals to dismiss the Potts and Boag appeal. On March 11, 1942, the Circuit Court did dismiss the appeal (R. 14, paragraph 4). These legal steps automatically confirmed the Reorganization Plan.

On December 18, 1943, Charles L. Bradley died. His executors were appointed by the Probate Court of Cuyahoga County and qualified on December 23, 1943. Bradley and Murphy had filed claims of title to the Higbee securities and the avails thereof in reorganization. Bradley's executors entered appearance in these Higbee reorganization proceedings when the actions were revived against them in the Circuit Court on February 23, 1944 (R. 39). In November, 1944, the Higbee securities were delivered to Bradley's estate and Murphy. At the time of hearing the instant case in the District Court these securities had a value of $3,637,475 calculated at prices per share stipulated by counsel for respondents (R. 41, 42). The District Court, however, retained jurisdiction over the final disposition of the Higbee securities. In the final decree of discharge, the court said (R. 167):

> "V. That this Court hereby retains jurisdiction of the proceedings in this cause solely for the purpose of hearing and determining the following matters:
>
> (a) * * * together with any and all matters relating to said new note, said new common stock and said participation in said proceeds, including the escrow with The Cleveland Trust Company established by order entered on August 21, 1942. * * *"

(These are the Higbee securities referred to herein.)

ARGUMENT.

Respondents Should be Held Accountable.

In previous litigation the Supreme Court held that Potts and Boag were accountable to the preferred stockholders of Higbee for what they received from their "sale" of the appeal to respondents. The basis of the decision, 324 U. S., 204 (R. 5), is that the bankruptcy law is intended to bring about a ratable distribution among creditors and to protect the creditors from one another. The Supreme Court laid down the rule that claimants in bankruptcy reorganization utilizing the rights afforded under the bankruptcy law were responsible to their class of claimants to act in good faith and could not profit above their class by trafficking in bankruptcy litigation. We quote from the opinion of the Supreme Court (R. 9):

> "We are now asked to say that the privilege of appeal granted to Potts and Boag by the Act, vested them with an indefeasible right to sell the privilege to the disadvantage of all other stockholders in their class. But, historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another. And the corporate reorganization statutes look to a ratable distribution of assets among classes of stockholders as well as creditors. There would be no ratable distribution of this bankrupt estate if Potts and Boag could utilize their statutory right of appeal to get for their preferred stock $7.00 for every $1.00 paid to other preferred stockholders. We are asked to say that Congress intended such a consequence, and to construe the right of a stockholder to be heard on a plan of reorganization as carrying with it the right to 'sell' the very appeal which the Act grants him.
>
> Potts and Boag, by appeal from a judgment which affected a whole class of stockholders owed an obligation to them, the full extent of which we need not now delineate. Certainly, at the very least they owed them an obligation to act in good faith."

Bradley and Murphy were the largest creditors in the Higbee reorganization proceedings. They had bought from the Ball Foundation a participation in the Senior Indebtedness, the entire Junior Indebtedness and all of the common stock. As individuals they had more at stake than any other creditor. In their official capacity as directors, and Bradley as president of Higbee, as developers of the Plan of Reorganization, they owed a fiduciary obligation to all Higbee creditors. Can it be said that the obligation of these directors towards Higbee stockholders is less than that owed by Potts and Boag, who held no official position, but were merely complaining stockholders?

Potts and Boag have been held to have no right to sell an appeal. They have been found to owe an obligation to act in good faith towards their fellow stockholders, so that they all might rate equally. Corporate directors who "bought" the Potts and Boag appeal with the intention of dismissing it, thereby to confirm the Reorganization Plan and to obtain for themselves securities worth several million dollars, for which they had paid but $60,000 in cash, certainly, at the very least, owed an obligation to all Higbee stockholders to act in good faith.

Respondents, of necessity, were abusing the bankruptcy law which was intended to bring about a ratable distribution among the creditors and to protect the creditors from one another. There was no ratable distribution of this bankrupt estate. Bradley and Murphy realized $50.00 for every $1.00 of cash invested by buying the bankrupt securities during the reorganization proceedings, and then concluding the reorganization to their advantage by buying the appeal which questioned their participation in the avails of the reorganization.

It is well established law that corporate officers may not use their position for their own personal gain to the detriment of stockholders of the company. See *Pepper v. Litton*, 308 U. S. 295 at 311. Respondents cannot shake off

their responsibilities to Higbee stockholders by trading in the rights of these stockholders for respondents' own aggrandizement. We quote from the Supreme Court opinion re Potts and Boag (R. 11):

> "To hold that the Chandler Act permits this, would be to say that Congress, which sought more effectively to accomplish fair and equitable treatment of investors, had by granting a right of appeal to stockholders, defeated its purpose, and had substantially modified the whole body of law imposing the most rigorous responsibilities for fair dealing upon those who represent the rights of others. (Cf. *Woods v. City Bank*, 312 U. S., 262, 267-269; *Meinhard v. Salmon*, 249 N. Y. 458.)"

Bradley and Murphy as senior officers of Higbee represented all stockholders and were obliged further, as officers of the debtor company in possession of its property, by permission of the Bankruptcy Court, to represent the interests of all creditors of Higbee. Judge Cardozo in writing the opinion in *Meinhard v. Salmon*, 249 N. Y. 458, said:

> "Many forms of conduct permissible in a work-a-day world for others acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *Wendt v. Fischer*, 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court."

Accounting Does Not Reopen Reorganization Plan.

The Circuit Court thought it desirable that this Higbee litigation be terminated. That Court, in effect, held it was more important that nothing be done to disturb the Reorganization Plan, than to hold respondents accountable for their personal profits made from actions taken in their official positions in the reorganization proceedings. An end to litigation is always desirable. However, principle comes ahead of expediency. Even so, there is no conflict between the completion of the Higbee reorganization and the accountability of respondents.

The Supreme Court found that Potts and Boag were accountable to the preferred stockholders of Higbee. This accountability in no manner disturbed the finality of the Reorganization Plan. Likewise, the accountability of Bradley and Murphy to the Higbee Co. for what they received as the result of "buying" the Potts and Boag appeal need not disturb the finality of the Reorganization Plan. The Higbee Co. has been operating as a private corporation, free of control by the Bankruptcy Court, since December 1, 1942. If respondents should be found to owe to the Higbee Co. all or part of the more than three million dollars profit they made from trading in Higbee securities and appellate litigation during bankruptcy, that fact could hardly injure the credit of the company or the rights of its stockholders, so as to cause it to go back into bankruptcy.

Petitioner's Claim Is Not Res Adjudicata.

There can be no doubt that the Circuit Court erred in holding that the issues in the instant case were decided adversely to the petitioner in *Young v. Bradley,* 142 F. (2d), 658 (C. C. A. 6). That decision, as an examination of the printed opinion shows, related to the several claims of Young, Kirby, Terminal and Shaker Heights Realty Co. and Kolbe, that they were owners of the Higbee securities purchased from the Ball Foundation. Those claims were

based upon the assertion that Bradley and Murphy owed fiduciary obligations to the claimants because of relationships established in 1937. Young and Kirby filed their claims June 3, 1941, nine months before Bradley and Murphy bought the Potts and Boag appeal, March 7, 1942, and a month prior to the date the District Court first approved the Reorganization Plan on July 2, 1941.

The instant case is a representative action brought by petitioner on behalf of all Higbee stockholders, complaining of the profits made by respondents as a result of their "buying" the Potts and Boag appeal, thereby finally confirming the Reorganization Plan. This case has no relation to the prior claim filed by Young for his personal benefit, which was decided adversely to him by the Circuit Court in 142 F. (2d) 658. The adverse judgment against Young in that case is final. But the issues and questions there presented by Young are not the same as those raised in this representative action.

Opinions Below.

The opinion of the District Court was not published. It appears in the Record at page 268. The extensive order of the District Court in conformity with the opinion appears in the Record at page 271. The opinion of the Circuit Court of Appeals is found in the Advance Sheets of Federal Reporter, Second Series, for January 19, 1948. The citation is 164 F. (2d) 426. It appears in the Record at page 290.

CONCLUSION.

WHEREFORE, Petitioner respectfully prays the issuance of a Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 635.

In the Matter of
THE HIGBEE COMPANY,
Debtor.

BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,
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JOHN P. MURPHY and
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Executors of the Estate of Charles L. Bradley,
deceased,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Young v. Higbee Co., et al., 324 U. S. 204..... 4

In the Supreme Court of the United States

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Executors of the Estate of Charles L. Bradley,
Deceased,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondents have filed two briefs. One deals with the subject generally. The other on behalf of the Bradley Estate comments only on the Ohio Statutes concerned with the probate of estates.

Inasmuch as the lower courts decided the case on grounds other than the Ohio Probate laws, there is no issue here made with respect to those laws. It is true though, that a novel question is presented as to the possible conflict of the Probate laws of a state with United States Bankruptcy Laws.

The following remarks have to do with the brief filed on behalf of both respondents concerning the issues made by the decisions below. Page references are to that brief.

On page 3, respondents admit that they bought from Potts and Boag their shares of Higbee as objecting stockholders:

> "*solely* for the purpose of accomplishing a dismissal of the stockholders' appeal, thus enabling them (respondents) to finance payment of their note, etc. * * *."

And again at page 6, respondents say:

> "the *sole* purpose of the purchase by Bradley and Murphy of the stockholdings of Potts and Boag, and the dismissal of their appeal, was to protect themselves against an attempted seizure by Petitioner Young of Bradley and Murphy's holdings."

These statements admit the chief contention asserted by petitioner that respondents trafficked in the securities and litigation of the bankrupt "*solely* to protect themselves." It is not claimed that the transaction was for the benefit of the Higbee estate. What clearer admission could be had of the abuse of corporate office and the violation of duty in bankruptcy proceedings by officers trusted by the court, than is contained in respondents' brief.

At page 5 respondents refer to a suit brought by Young demanding an accounting for the profits made by Potts and Boag in the sale to Bradley and Murphy complained of. It is to be noted that the action referred to concerned only the profits made by Potts and Boag. At page 9, respondents, in further reference to the same litigation, admit that the claim was only:

> "for what Bradley and Murphy paid to purchase the Potts-Boag stockholdings and the right to dismiss the appeal."

The cause stated in the instant case is entirely different. Petitioner here seeks to hold Bradley and Murphy for what they gained, not what they paid to Potts and Boag. The rights asserted by petitioner in this action are for Bradley and Murphy's profit of more than $3,000,000. The rights asserted in the other action con-

cerned $115,000, the amount Bradley and Murphy paid to Potts and Boag.

The case of *Chicot County District v. Bank,* 308 U. S. 371, referred to by respondents at page 12, requires that in the first action all available matter which might have been presented "to sustain or defeat the rights asserted" be brought forth. That well-known principle is not applicable here because "the rights asserted" in the instant case are not the same as in the former case.

In *Southern Pacific Co. v. Bogert,* 250 U. S. 483, 490, the court dealt with a similar claim that previous litigation between the same parties was *res judicata* to the instant action. The Court said:

> "But in none of these suits was the question here in issue decided. Except in so far as those cases were disposed of on objections to jurisdiction, they decided merely that the foreclosure could not be set aside as fraudulent; that the minority stockholders could not have the reorganization agreement declared fraudulent; and that they could not compel a reduction of the assessment made under it, or enjoin distribution of the stock according to its terms. The minority stockholders sought, when presenting the case in the court of appeals of New York (*MacArdell v. Olcott,* 189 N. Y. 368, 372, 373, 82 N. E. 161), to have declared the trust which was later decreed in this suit; but that court refused to consider the contention, for the reason that this claim to relief was based upon a theory 'widely at variance' with that upon which that action was commenced and tried. Because of such wide divergence the earlier decrees do not operate as *res judicata.* And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis."

At page 7 respondents claim that they "as owners of all of debtor's old common stock were entitled to all of

debtor's equity." That assertion begs the question to be decided in this case. If respondents' overreaching conduct requires them to account for their gains, then they certainly are not "entitled to all of debtor's equity."

Respondents again, at page 14, refer to "all of the old common stock of debtor," and say that their claim to it was not contested in the Potts-Boag appeal. That is true only in a technical sense because the reorganization awarded nothing specifically for the old common stock. The entire share allotted to respondents for the Higbee securities they had brought from the Ball Foundation was challenged by the Potts and Boag appeal.

Petitioner emphasizes that he is not seeking a "complete modification of the Plan of Reorganization" as asserted by respondents at page 11. He asks only for an equitable accounting for profits derived from inequitable acts of respondents, committed after the approval of the compromise plan.

At pages 7-11, respondents challenge the jurisdiction of the Bankruptcy court. This same defense was ruled groundless by the Supreme Court in *Young v. Higbee Co., et al.*, 324 U. S. 204 (R. 12) when it said:

> "The District Court still has jurisdiction to exercise its powers under the Act, both because of its express reservation and because of the provisions of Section 222."

Respectfully submitted,

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INDEX.

Statement of the Matter 1

Argument 5

In the Circumstance of the Admitted Failure of the Petitioner to Comply With Applicable Limitation Sections of the Ohio Probate Code, the Estate of the Decedent is Without Liability as a Matter of Law 5

The Sections of the Ohio Probate Code Can Be Given Their Intended Controlling Effect Without in Any Way Impinging Upon the Bankruptcy Act or Upon the Jurisdiction of the Bankruptcy Court 7

The Revivor of Actions Pending at the Time of the Decedent's Death Did Not Dispense With the Necessity of the Petitioner's Compliance With the Applicable Provisions of the Ohio Probate Code 9

Conclusion 11

TABLE OF AUTHORITIES.

Cases.

Beach v. Mizner, 131 Ohio St. 481 (1936) 6

Bollinger v. National Fire Ins. Co. (Sup. Ct. Cal. 1944), 147 Pac. 2d 611, reversed on other grounds, 154 Pac. 2d 399 (1945) 8-9

Burnham v. Todd (C. C. A. 5, 1943), 139 F. 2d 338 8

Carr v. Yokohama Specie Bank, Ltd., et al. (N. Y. Sup. Ct. App. Div. 1947), 272 App. Div. 64, 69 N. Y. S. 2d 262 8

Fern v. Leuthold, et al., 39 Minn. 212, 39 N. W. 399 (1888) 10

Hummel v. Equitable Assurance Society (C. C. A. 7, 1945), 151 F. 2d 994 8

McBride v. Farrington (D. C. Ore. 1945), 60 F. Supp. 92, aff'd. 156 F. 2d 971 (C. C. A. 9, 1946)..... 8

Prudential Ins. Co. of America v. Joyce Building Realty Co., et al., 143 Ohio St. 564 (1944)..... 6

Stange, Admr. v. Campbell, Admr., 75 Ohio App. 316 (1945) 6

State, ex rel. v. Coburn, 133 Ohio St. 192 (1938)..... 6

Statutes.

Bankruptcy Act 7, 8

Chandler Act 7, 8

Ohio Probate Code:

G. C. 10509-112 .....3, 5, 10

G. C. 10509-134 .....3, 5, 10

G. C. 10509-216 .....3, 5, 6, 10

11 U. S. C. A. Sec. 29(e)..... 7

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 635.

In the Matter of
THE HIGBEE COMPANY,
Debtor.
BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,
Petitioner,

v.

JOHN P. MURPHY and
GERTRUDE BAKER BRADLEY and ALVA BRADLEY,
Executors of the Estate of Charles L. Bradley, Deceased,
Respondents.

BRIEF OF RESPONDENTS, GERTRUDE BAKER BRADLEY AND ALVA BRADLEY, EXECUTORS OF THE ESTATE OF CHARLES L. BRADLEY, DECEASED, OPPOSING PETITION FOR CERTIORARI, ON ISSUE OF LIMITATIONS.

STATEMENT OF THE MATTER.

With no lack of confidence in the defenses common to themselves and to respondent John P. Murphy, Gertrude Baker Bradley and Alva Bradley, Executors of the Estate of Charles L. Bradley, Deceased, make this brief statement of the matter involved, for the purpose of presenting a defense accruing to them alone which does not appear from the other briefs before the Court but which is "in reserve" in the sense that determination of the issue has so far been unnecessary to complete vindication of the rights of the

Estate of Charles L. Bradley, deceased, and of John P. Murphy, jointly presented.

The issue in question is the admitted failure of the petitioner to file with the respondent executors within the period prescribed by state law, any claim setting forth his asserted right to represent shareholders of the company in the attempt to compel an accounting by the estate which the respondents filing this brief represent, as well as by the said Murphy. There is no denial of the few simple facts which give rise to this issue (See Petitioner's Brief, p. 11).

In short, Charles L. Bradley, over a period of several years prior to his death, was a co-defendant with John P. Murphy in the numerous tests instituted by the petitioner of their joint right to the Higbee securities representing the avails to Bradley and Murphy of the debtor's plan of reorganization, overwhelmingly accepted by the debtor's stockholders, including the petitioner, and approved not only by the District Court but by the Circuit Court of Appeals for the Sixth Circuit. In the ebb and flow of this litigation over a period of several years, Bradley and Murphy were represented by common counsel, whose skill is attested by their uniform success in vindicating their clients' rights.

On December 18, 1943, however, Charles L. Bradley died; his executors were appointed by the Probate Court of Cuyahoga County, Ohio and qualified as fiduciaries on December 23, 1943 (R. 39). At this time two actions instituted by the petitioner were pending against the decedent and Murphy in the Circuit Court of Appeals; one asserted ownership of the Higbee securities by Young and his associates, while the other sought to compel an accounting by Potts and Boag, and Bradley and Murphy of alleged unconscionable avails to the former from the sale to Bradley and Murphy of shares in the Higbee Company which permitted confirmation of the reorganization plan. On

February 23, 1944, both actions were revived as against the Executors of the Estate of Charles L. Bradley, Deceased (R. 39). The former action was decided by the Circuit Court of Appeals in favor of the respondent fiduciaries and Murphy on April 21, 1944 (142 F. 2d 658), and certiorari was denied in this Court on November 13, 1944 (323 U. S. 775). The latter action came to an end on May 15, 1944 (142 F. 2d 1004), upon the denial by the Circuit Court of Appeals of the petitioner's attempt to compel an accounting; this action by the appellate court became final as to the representatives of Charles L. Bradley and as to John P. Murphy on failure of the petitioner to apply for a writ of certiorari as to them. A writ was applied for only as to Potts and Boag. See: 324 U. S. 204, Note 4 at page 208 (R. 7). Only upon reversal of the Circuit Court of Appeals' holding and upon this Court's requiring an accounting of Potts and Boag pursuant to the opinion filed on February 26, 1945, did the petitioner by his present petition for an accounting filed on May 19, 1945 (R. 2) seek once again to compel an accounting by Bradley's executors and by the respondent Murphy.

Then for the first time, it became apparent, with the failure of the petition (R. 2) to state that a claim asserting the petitioner's accounting demands had been timely filed with the decedent's executors, that the estate was entitled to the benefit of the non-claim sections of the Ohio Probate Code (General Code, Secs. 10509-112, 10509-134, 10509-216, *infra*, pp. 5-6). Wishing to see the issue tested, the respondent executors applied to the Probate Court for the appointment of special counsel. The question was initially raised through motion to dismiss and later, at the request of the District Court, by answer. That court held for the respondents on defenses common to them both. Taking note of the fact that the petitioner had stipulated (R. 39) that at no time had any claim been filed with the respondent executors, the trial court said (R. 270-71):

> "There is strong support for the Bradley Estate's motion to dismiss and except for the fact that the issues on the merits are so clearly against recovery I otherwise should have been inclined to sustain the motion. If, as the petitioner seems to contend, this proceeding is an entirely new and different claim against Bradley, it has been asserted too late to avoid the consequences of Bradley's death and the required compliance with probate laws of Ohio in respect of making or filing claim in that court."

Thereafter the admitted facts were embodied in the court's journal entry (Finding 15, R. 276; Conclusion 7, R. 277-78), while at the same time the court formally overruled the motion to dismiss initially filed by the respondent fiduciaries. In the Circuit Court of Appeals the rights of the respondents were again held to be completely vindicated within the framework of their common defenses, the court stating with reference to the special defense of limitations available to the respondent executors (R. 293):

> "Inasmuch as we have concluded that appellant Young is foreclosed from reopening his contest with Murphy and Bradley over the subject matter of his petition now under review, we pretermit as useless discussion of the secondary defense of the Bradley estate, based upon the argument that appellant has failed to comply with applicable limitation sections of the Ohio Probate Code."

ARGUMENT.

IN THE CIRCUMSTANCE OF THE ADMITTED FAILURE OF THE PETITIONER TO COMPLY WITH APPLICABLE LIMITATION SECTIONS OF THE OHIO PROBATE CODE, THE ESTATE OF THE DECEDENT IS WITHOUT LIABILITY AS A MATTER OF LAW.

The motion to dismiss filed by the respondent fiduciaries through their special counsel appointed by the Probate Court of Cuyahoga County, Ohio, was based solely on the petitioner's admitted failure, apparent initially on the face of the petition (R. 2-4) and later in counsel's stipulation (R. 39), to comply with Ohio General Code Secs. 10509-112 and 10509-134, and perhaps in petitioner's view, with Sec. 10509-216 and related statutes. So far as apposite, these sections of the Ohio Probate Code provide as follows:

> "Sec. 10509-112. *Presentation and allowance of creditors' claims.*—All claimants shall present their claims to the executor or administrator in writing, including claims arising out of contract, out of tort, on cognovit notes or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated. *All claims shall be presented within four months after the date of the appointment of the executor or administrator.* * * * Claims which are contingent need not be presented except as otherwise provided in this chapter."

> "Sec. 10509-134. *Presentation of claims after four months.*—A claimant who has failed to present his claim to the executor or administrator within the time prescribed by law may file a petition in the probate court for authority to present his claim after the expiration of such time. * * * *provided, however, that a claim which is not presented within nine months from the appointment of the executor or administrator shall be forever barred as to all parties, including devisees, legatees and distributees, and no payment shall be made nor any action maintained thereon, except as otherwise provided in this chapter with reference to contingent claims.* * * *"

"Sec. 10509-216. *Contingent claims; when to be presented.*—If a claim is contingent at the time of the decedent's death and a cause of action subsequently accrues thereon, such claim must be presented to the executor or administrator, in the same manner as other claims, *before the expiration of four months after the appointment of the executor or administrator or before the expiration of two months after the cause of action accrues, whichever is later,* * * *." (Emphasis supplied in each reference.)

It is definitely admitted in the record that the petitioner at no time presented any claim to the Executors of Charles L. Bradley's Estate asserting in a representative capacity or otherwise the alleged right to an accounting by the respondents. If, for the purpose of argument the filing of the instant action were to be considered the presentation of a "contingent claim," it came too late in the circumstance of the Supreme Court decision in the Potts-Boag matter on February 26, 1945, and the filing of the respondents' petition in accounting on May 19, 1945, more than two months thereafter.

It has been repeatedly held in Ohio that the statutes in question are related and when considered together as their context requires, constitute statutes of limitation or non-claim barring any and all actions against a decedent's estate based on claims which have not been timely presented. *Beach v. Mizner,* 131 Ohio St. 481 (1936); *State, ex rel. v. Coburn,* 133 Ohio St. 192 (1938); *Prudential Ins. Co. of America v. Joyce Building Realty Co., et al.,* 143 Ohio St. 564 (1944); *Stange, Admr. v. Campbell, Admr.,* 75 Ohio App. 316 (1945).

It is perhaps worthy of remark that statutes of this nature are quite obviously intended to facilitate the prompt administration of decedents' estates; they assure a proper sequestration of the assets of a decedent, their application to proved claims of creditors and to tax claims, and their early distribution according to the statutes of descent and distribution or in accordance with the testator's last will

and testament. These purposes are quite like the aims served by the Bankruptcy Act; they should not be put in jeopardy by the failure of Federal courts to enforce the applicable sections as statutes of repose, at least in the circumstances of the endless litigation brought by the petitioner against the decedent Charles L. Bradley, as well as against his estate following his death.

THE SECTIONS OF THE OHIO PROBATE CODE CAN BE GIVEN THEIR INTENDED CONTROLLING EFFECT WITHOUT IN ANY WAY IMPINGING UPON THE BANKRUPTCY ACT OR UPON THE JURISDICTION OF THE BANKRUPTCY COURT.

Nothing in the Bankruptcy Act or in the Chandler Act applicable to the Higbee reorganization proceedings after its effective date on September 22, 1938, militates against the conclusion that the sections of the Ohio Probate Code here involved, when coupled with the admitted failure of the petitioner to apprise the respondent executors of his "entirely new and different claim" (R. 276-78), effectively and conclusively bar the claim now asserted in the trustee-less debtor's behalf against the Estate of Charles L. Bradley, Deceased. Section 11(e) [11 U. S. C. A. Sec. 29(e)] of the amending legislation reads in part:

> "(e) A receiver or trustee may, within two years subsequent to the date of adjudication *or within such further period of time as the Federal or State law may permit,* institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * * *where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act,* and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, *the receiver or trustee of the bankrupt may, for the benefit of the estate, take any*

*such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted * * * in the proceeding or by applicable Federal or State law, as the case may be.*" (Emphasis supplied.)

There being authority for the position that this limitation section incorporated in the Bankruptcy Act by the Chandler Act has application only to claims in favor of the debtor in existence at the time a trustee qualifies or favorable action is had on a petition for reorganization (See: *Burnham v. Todd* [C. C. A. 5, 1943], 139 F. 2d 338), Section 11(d) of the Bankruptcy Act prescribing a two-year period of limitation dating from the order closing the estate, an order entered in the Higbee reorganization proceedings on December 1, 1942 (R. 165-67), might have application. If it did, the petitioner's claims would be barred as to both defendants.

If no limitation period is prescribed in the Bankruptcy Act as amended, reaching a claim of the nature here asserted, it is clear that state statutes of limitation have effect (*Burnham v. Todd, supra*), and this is particularly true where a claim, such as that here under consideration, is based on general equitable doctrines which have no reference to and are not the creature of the Bankruptcy Act itself. See: *McBride v. Farrington* (D. C. Ore. 1945), 60 F. Supp. 92, aff'd. 156 F. 2d 971 (C. C. A. 9, 1946); *Hummel v. Equitable Assurance Society* (C. C. A. 7, 1945), 151 F. 2d 994. It must be obvious, therefore, that the claim here asserted by the petitioner falls within the provisions of Ohio Probate Code insofar as it relates to assertion of any rights to the Higbee securities held by the Estate of Charles L. Bradley, Deceased. This is also the rule under applicable state decisions. *Carr v. Yokohama Specie Bank, Ltd., et al.* (N. Y. Sup. Ct. App. Div. 1947), 272 App. Div. 64, 69 N. Y. S. 2d 262; *Bollinger v. National Fire Ins. Co.* (Sup. Ct. Cal.

1944), 147 Pac. 2d 611, reversed on other grounds, 154 Pac. 2d 399 (1945).

Giving effect to the limitation sections of the Ohio Probate Code will in no way impinge upon the exercise of proper bankruptcy jurisdiction. The respondent executors have awaited and complied with every order of the Bankruptcy Court and have perfected their rights to the securities now in question only after those rights had been contested by the petitioner in various suits, the most recent of which resulted finally upon a denial of a writ of certiorari by this Court [323 U. S. 775 (1944)]. Thus, there is no contest between the state statutes of limitation and the provisions of the Chandler Act on the one hand, or the proper exercise of general bankruptcy functions on the other. By its very terms the Chandler Act envisages and authorizes the application of state statutes of limitation to claims such as are here involved, arising after the adjudication in bankruptcy.

THE REVIVOR OF ACTIONS PENDING AT THE TIME OF THE DECEDENT'S DEATH DID NOT DISPENSE WITH THE NECESSITY OF THE PETITIONER'S COMPLIANCE WITH THE APPLICABLE PROVISIONS OF THE OHIO PROBATE CODE.

Mention in the petitioner's brief (at page 11 thereof) of the revivor of two actions pending at the date of the death of Charles L. Bradley, Deceased, is indicative of an intention, if the opportunity is presented, to contend that this action eliminated the necessity for the presentation of the petitioner's claim to the decedent's executors. On the record (R. 39) the revivor of these actions (the one, the contest which ultimately established the right of the Bradley Estate and Murphy to the Higbee securities; the other, the accounting action against Potts and Boag, and Bradley and Murphy), took place on February 23, 1944, but two months following the qualification of the decedent's executors, when an additional period of at least two months.

under General Code Secs. 10509-112 and 10509-216, or on a proper showing, up to seven months under Sec. 10509-134, remained. If the petitioner did not then intend to find full satisfaction in the litigation of the claims in which he was at that time engaged, it would have been a simple matter to comply with the non-claim statutes, at the same time advising the respondent executors of the endless litigation with which they were still confronted.

While the authority is limited, that which is available is clearly to the effect that the revivor in the name of the executors of an action pending against a decedent at his death can affect only the claims in suit at the time of the revivor and does not constitute a permanent dispensation for all purposes with the necessity for compliance with limitations of the nature prescribed by the Ohio Probate Code. *Fern v. Leuthold, et al.*, 39 Minn. 212, 39 N. W. 399 (1888). Reason and logic support this view; as the Supreme Court of Minnesota, in the case cited, said:

> "* * * the respondents had no standing in court as creditors; having neither presented their claims for allowance to the probate court within the time limited for that purpose, nor having any suit pending on them against Fern at the time of his death. Not having been presented to the probate court for allowance, the claims were certainly barred under the provisions of Gen. St. c. 53, Sec. 14, unless saved by section 16 of the same chapter, by reason of the pendency of an action on them at the time of Fern's death. But we take it that, to bring the case within this section, *the specific claim or cause of action must be in litigation at the time of the debtor's decease. Only the claim thus in litigation can be paid without being proved in the probate court.*
>
> *"It is not enough that the deceased was a party to an action for another purpose; nor can an action brought for some other purpose be changed, after his death, into one for the recovery of a debt against his estate.* * * *
>
> "We think we are justified by the record in saying that the idea of holding Fern liable was an afterthought, that did not enter into the minds of the parties

when framing their pleadings; * * *." (39 N. W. at pp. 401-2, emphasis supplied.)

CONCLUSION.

For the reasons stated and on the authorities cited it is apparent that the issue of limitations under the Ohio Probate Code, while denominated by the Circuit Court of Appeals a "secondary defense," is a complete protection as a matter of law for the Estate of Charles L. Bradley, Deceased, which has so far prevailed in this latest contest initiated by the petitioner on the strength of the defenses common to it and to the living defendant, John P. Murphy. There appears, however, no special or important reason for this Court separately to consider this issue except as a bulwark to the common defenses already found completely sufficient by both the district and appellate courts. There has been no decision in the lower courts on this question of local law, since the District Court and the Circuit Court of Appeals held unqualifiedly with the defenses jointly put forward in behalf of the respondent estate and its fellow respondent, Murphy. There appears no departure from the accepted and usual course of judicial proceedings which would furnish the occasion for this Court's considering the indicated additional defense available to the Bradley Estate, except in the event that the views of this Court on the availability and force of the common defenses depart from the views of the lower courts, as cannot be foreseen at this late stage of the litigation instituted and reinstituted by the petitioner.

The writ of certiorari sought should be denied.

Respectfully submitted,

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OCTOBER TERM, A. D. 1947.

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Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Statement of Facts 1

Brief 6

1. The Bankruptcy Court had no jurisdiction of the subject matter presented by the petition when it was filed 7

2. Petitioner Young and the class which he claims to represent are barred by the doctrine of *res judicata* by reason of the judgment which determined that Bradley and Murphy were not only the legal but also the equitable owners of the Higbee securities 11

3. Petitioner Young and the class which he claims to represent are barred by the doctrine of *res judicata* by reason of the judgment against him and his class and in favor of Bradley and Murphy determining that Bradley and Murphy were not accountable to the Debtor or its preferred stockholders because of their purchase from Potts and Boag of the dismissal of the appeal 13

Petitioner's "Reasons for Allowance of the Writ" 14

TABLE OF AUTHORITIES.

Cases.

Argyle-Lake Shore Corp., In re, 98 F. 2d 372 (C. C. A. 7, 1938) 11

Baird v. U. S., 96 U. S. 430..... 14

Chicot County District v. Bank, 308 U. S. 371..... 12

Consolidated Rock Co. v. DuBois, 312 U. S. 510..... 15

Corona Radio & Television Corp., In re, 102 F. 2d 959 (C. C. A. 7, 1939)..... 11

Green v. Bogue, 158 U. S. 478..... 14

Peyton Realty Co., In re, 148 F. 2d 771 (C. C. A. 3, 1945) 11

Prudence Corp. v. Ferris, 323 U. S. 650.....11, 12

Stoll v. Gottlieb, 305 U. S. 165..... 12

Wedgewood Hotel Co., In re, 125 F. 2d 327 (C. C. A. 7, 1942) 11

Young v. Bradley, 142 F. (2) 658, cert. den. 323 U. S. 775 4

Young v. Higbee, et al., 324 U. S. 204..... 10

Statutes.

Chandler Act:

Section 216 (8) (11 U. S. C. 616 (8))..... 14

Section 221 (11 U. S. C. 621)..... 14

Section 222 (11 U. S. C. 622)..... 10

Section 228 (11 U. S. C. 628)..... 10

Bankruptcy Act:

Section 207(b) 10

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BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI.

The case which is stated in the petition and in petitioner's brief is neither the case which was presented to the courts below nor the one which is disclosed by the record. There can be no dispute as to what the facts are since substantially every important fact is made the subject of a finding by the trial court.

STATEMENT OF FACTS.

The Higbee Company, at a time when its board of directors of seven members was elected solely by the preferred stockholders (R. 40, 124), formulated and filed its Plan of Reorganization. Under the terms of the Plan the treatment of the securities owned by Bradley and Murphy

represented a compromise. (R. 67, 71, 119, 122.) The compromise was this:

The junior debt, amounting to $1,900,000 (R. 58, 103), was recognized to the extent of $600,000 only, as an obligation ahead of the preferred stock; the balance of the junior debt was compensated for in common stock at the rate of one share for each $100.00 thereof; the old common stock was surrendered for cancellation without other treatment under the Plan. (R. 122, 61, 71, 102.)

The Securities and Exchange Commission, which was a party to the proceedings, recommended its adoption as fair and feasible. (R. 96 to 129, inclusive.)

Upon submission to the creditors and stockholders, written acceptances of the Plan were filed by 87.9% of the First Preferred stockholders, 96.5% of the Second Preferred stockholders and 100% of the creditors. (R. 137-8.)

Only two stockholders (neither of whom was Petitioner Young) opposed the Plan. They prosecuted an appeal to the Circuit Court of Appeals from the order of confirmation. Their total holdings were 260 shares or 2.3% of First Preferred stock. (F.* 2, R. 272; F. 12, R. 182.)

Young, the petitioner here, was invited to join these two stockholders in their appeal from the order of confirmation. (F. 2, R. 272.) He refused to join in the appeal, assigning as his reason that he wanted Bradley and Murphy to get all that they could out of the Plan of Reorganization so that there would be that much more for him to take away from them. (F. 15, R. 182.) He consented to the Plan and agreed to be bound by its terms. (F. 32, R. 185.) He thereupon filed a claim that he, and not Bradley and Murphy, was the owner of the participation in the senior debt, the entire junior debt and all of the old common stock. (R. 198.)

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* Explanation of record abbreviations: Substantially every important fact has been made the subject of a special finding of fact by the trial court. These are referred to with the abbreviation F. Thus: F. 2, R. 272 means Finding 2, Record page 272.

While this controversy between Young and Bradley and Murphy over the ownership of the Higbee securities was pending and prior to any hearing thereon by the District Court, Petitioner Young acquired from the owners thereof the note of Bradley and Murphy in the amount of $540,000 which they had given to the Ball Foundation at the time of their purchase of claims against The Higbee Company and of all of its common stock. (F. 4, R. 272.) This note was secured by the pledge, as collateral, of the claims and securities which Bradley and Murphy had bought. (F. 3, R. 272.) The note imposed no personal liability on either Bradley or Murphy but provided for enforcement only against the collateral pledged. (F. 3, R. 272.)

Immediately upon the acquisition of the Bradley-Murphy note, Petitioner Young declared it to be due, and was on the verge of selling the collateral to himself (F. 4, R. 272; F. 44, R. 238) when Bradley and Murphy, solely for the purpose of accomplishing a dismissal of the stockholders' appeal, thus enabling them to finance payment of their note to Young, purchased the stockholdings of Potts and Boag, the only objecting stockholders. (F. 5, R. 272.) At the same time, seeking to prevent Bradley and Murphy from borrowing the funds necessary to pay their note, Petitioner Young attempted to buy from Potts and Boag these same stockholdings. (F. 5, R. 273.) It was only after considerable competition with Young that Bradley and Murphy were able on March 7, 1942 to make the purchase from Potts and Boag for $115,000, although its market value at that time was only approximately $17,000. (F. 5, R. 272-3.)

On March 9, 1942 Bradley and Murphy applied to the Circuit Court of Appeals for the dismissal of the appeal. (F. 6, R. 273.) Upon the filing of the application for dismissal Petitioner Young, in a further attempt to prevent Bradley and Murphy from paying their note and despite

his previous acceptance of the Plan of Reorganization, filed an application in the Circuit Court of Appeals for leave to intervene, to become a party to the appeal and to oppose its dismissal. In this application Young purported to act in the same precise representative capacity as in the present case. (F. 6, R. 273.)

Hearings were had in the Circuit Court of Appeals, at which Young was represented by counsel, and a full presentation was made to the court of all the facts now relied upon by Young in these present proceedings. (F. 6, R. 273.) The court, after a full hearing, dismissed the appeal and denied Young's application. No review was sought by Young of this order of dismissal. (F. 6, R. 273.)

Bradley and Murphy were thereby enabled to and did borrow $566,290.36 and paid it to Young in full satisfaction of their note, thereby preventing seizure by Young of their interests in The Higbee Company. (F. 7, R. 273.)

Thereafter, the litigation between Young on the one hand and Bradley and Murphy on the other with respect to the legal and equitable ownership of the participation in the senior debt, the entire junior debt and all of Debtor's common stock was determined in favor of Bradley and Murphy and against Young. (R. 249 to 254.) The judgment of the District Court was affirmed by the Circuit Court of Appeals (R. 255, *Young v. Bradley*, 142 F. (2) 658) and certiorari was denied by this Court on November 13th, 1944. (R. 260, 323 U. S. 775.)

The judgment in that case provided:

> "* * * Bradley and * * * Murphy are hereby found and decreed to be the legal and equitable owners of said new note[1] of The Higbee Company in the face amount of $600,000.00 and of said 14,549.9 shares of new common stock of The Higbee Company * * *. * * * The claims

[1] The note for $600,000.00 and the shares of new common stock represented the avails, under the Plan of Reorganization, of the Junior Indebtedness.

filed by Robert R. Young and Allan P. Kirby, by Frank F. Kolbe and by The Terminal and Shaker Heights Realty Company[2] to said the Higbee securities and to said new note and new common stock are hereby disallowed and dismissed." (R. 253.)

Smarting under the defeat of his several schemes to get his hands on Bradley and Murphy's holdings, Young then, on November 20, 1942, and in the same representative capacity as that in which he now claims to act, instituted a further proceeding against Bradley and Murphy and the stockholders who had sold their holdings to them. In this latter proceeding Petitioner Young charged that Bradley and Murphy knowingly participated in an unlawful scheme to purchase the stock from Potts and Boag in order to cause the dismissal of their appeal. (F. 9, R. 274.) The basis of his claim (R. 142) was precisely the same as in the instant case (R. 2), namely, that Bradley and Murphy as officers and directors of the Debtor owed the duty to refrain from any act which would prevent the determination on its merits of the appeal filed by Potts and Boag. Young then asked that Bradley and Murphy as well as Potts and Boag be required to account to the Debtor's preferred stockholders for the profit made by Potts and Boag in the sale of their stock and their appeal. (F. 9, R. 274.) This case was tried and resulted in final judgment against Young and in favor of Bradley and Murphy. (F. 10, R. 274.)

On December 1, 1942 the District Court rendered final judgment in the reorganization proceedings discharging the Debtor and fixing the rights of all creditors and stock-

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[2] The Terminal and Shaker Heights Realty Company, formerly Midamerica Corporation, did not file its claim to the Higbee securities until March 28, 1942, some two weeks after the events occurred of which Petitioner now complains. (F. 35, R. 236.) Young and his associates were in complete control of Midamerica and they themselves together with members of Young's family owned substantially all of its stock. (F. 44, R. 238.)

holders. (F. 13, R. 275.) By the terms of said decree the Court retained jurisdiction solely for the purpose of hearing and deciding three matters and three matters only. (F. 13, R. 275; R. 167.) All three of the matters in respect of which the reservation was made had been heard and finally determined before this present case was filed. (F. 13, R. 275.) Not until May 19, 1945 did Petitioner Young commence the present proceeding. (R. 2.) The Plan of Reorganization had at that time been in effect for more than three years.

This is what has happened under the Plan: Every creditor of the Debtor has been paid in full. The holder of every share of the old first preferred stock has received securities, the market value of which, at the time of trial, amounted to $244 for each old share of first preferred stock. Every holder of the old second preferred stock has received securities the market value of which, at the time of trial, amounted to $455.50 for each old share of second preferred stock. As of the date when the Plan became effective, the redemption price plus the accrual of all unpaid dividends amounted to $180.03 for each share of old first preferred and $192.26 for each share of old second preferred. (F. 14, R. 275-6.)

BRIEF.

This case does not present a factual situation where officers or directors of a corporation in reorganization have, pursuant to a plan contrived for their own benefit, obtained an advantage to themselves either at the expense or to the detriment of creditors or stockholders. The sole purpose of the purchase by Bradley and Murphy of the stockholdings of Potts and Boag, and the dismissal of their appeal, was to protect themselves against an attempted seizure by Petitioner Young of Bradley and Murphy's holdings. (F. 4, 5, 6, 7, R. 272-3.) Every creditor of the Debtor has been paid in full. Every stockholder other than Bradley

and Murphy has received much more than he would have been entitled to under liquidation. (F. 14, R. 275.) Bradley and Murphy, as owners of all of Debtor's old common stock (F. 2, R. 229; R. 243; R. 253), were entitled to all of Debtor's equity. By reason of their compromise under the Plan of Reorganization, Bradley and Murphy shared their equity with the preferred stockholders. This accounts for the preferred stockholders receiving much more than their contractual rights. (F. 14, R. 275.)

The court below held against Petitioner Young for the following reasons:

1. The Bankruptcy Court is without jurisdiction to grant the relief sought, its jurisdiction having been exhausted upon the entry of the final decree of discharge.
2. The doctrine of *res judicata* prevents the granting of the relief now sought because of three former final judgments.
3. The defense of laches.

Petitioner Young in his Statement of Facts fails to set forth the facts upon which the court below based its judgment.

This brief will discuss only three of the several grounds upon which the lower court correctly denied to Petitioner Young the relief which he now seeks.

1. The Bankruptcy Court had no jurisdiction of the subject matter presented by the petition when it was filed.

The petition was filed May 19, 1945. (R. 2.) The District Court entered its final decree of discharge on December 1, 1942. (F. 13, R. 275.) By the terms of this decree the court retained jurisdiction for the sole purpose of hearing and determining three matters, namely,

(a) the litigation then pending for the purpose of determining the ownership of the participation in the senior indebtedness, the entire junior indebted-

ness and all of the Debtor's common stock together with the disposition of the avails of the junior indebtedness under the Plan;

(b) the accounting suit then pending in which Petitioner Young sought an accounting from Bradley and Murphy and Potts and Boag as a result of the purchase by Bradley and Murphy of the Potts-Boag stockholdings and the dismissal of their appeal;

(c) the allowance of compensation and other fees. (F. 13, R. 275; R. 167.)

The first matter in respect of which reservation of jurisdiction was made is defined in Section V, subparagraph (a) of the final decree of discharge. (R. 167.) The petitioner does not quote enough of the final decree to make its meaning understood. The entire clause describing the first of these three matters is as follows (R. 167):

"V. That this Court hereby retains jurisdiction of the proceedings in this cause solely for the purpose of hearing and determining the following matters:

(a) The litigation now pending in these proceedings and in respect of which the Special Master has heretofore filed his Ad Interim Report, and which will determine the ownership of the new note and the new common stock of the Debtor applicable to its so-called Junior Indebtedness and the proceeds of the participation in the Senior Bank Indebtedness of the Debtor held by J. P. Morgan & Company, New York City, applicable to the owner of the Junior Indebtedness, pursuant to paragraph 7 of the order entered herein by the Special Master on April 18, 1942, together with any and all matters relating to said new note, said new common stock and said participation in said proceeds, including the escrow with The Cleveland Trust Company established by order entered on August 21, 1942, but nothing herein contained shall constitute a confirmation or modification of said Ad Interim Report, jurisdiction to pass upon the same being hereby expressly reserved;"

What has happened to "the litigation now pending in these proceedings"? On March 16, 1943 the District Court entered its final judgment. The Circuit Court of Appeals thereafter affirmed the trial court and certiorari was denied by this Court on November 13, 1944. (F. 8, R. 273-4.) The judgment so rendered determined Bradley and Murphy to be the "legal and equitable owners of" the indebtedness and securities described in the reservation. (R. 253.) The "new note and said new common stock and said participation in said proceeds" were ordered to be delivered by The Cleveland Trust Company as Escrow Agent to Bradley and Murphy. (R. 253.) By reason of its compliance with the judgment the Escrow Agent has been discharged. (F. 8, R. 273-4; R. 254.)

It is obvious, therefore, that the trial court was correct in its finding (F. 13, R. 275) that the first matter reserved by the decree was "finally disposed of" on November 13, 1944. (F. 8, R. 273-4.)

The second matter reserved by the court in its final decree of discharge was the application referred to in Findings 9 and 10 of the District Court (R. 274) which involved the proceedings wherein Young, as a representative of preferred stockholders, sought to hold Potts and Boag and Bradley and Murphy accountable for what Bradley and Murphy paid to purchase the Potts-Boag stockholdings and the right to dismiss the appeal. In those proceedings the District Court rendered final judgment in favor of Bradley and Murphy. That judgment was affirmed by the Circuit Court of Appeals and no effort was made to secure its reversal in so far as it related to Bradley and Murphy. (F. 10, R. 274-5.) Petitioner Young certainly cannot contend that the present proceedings are the same. If he does he must admit the bar of *res judicata*.

The third subject of reservation related to the allowance of counsel fees which according to the findings of the trial court have been finally disposed of. (F. 13, R. 275.)

In an effort to avoid the effect of the decree of discharge, Petitioner Young in the court below relied on the language of this Court in *Young vs. Higbee, et al.*, 324 U. S. 204, 214. It was there said that the District Court had jurisdiction to enforce an accounting against Potts and Boag "both because of its express reservation and because of the provisions of Section 222." (Chandler Act.)

In the present case there is no express reservation which covers this proceeding.

The provisions of Section 222 of the Chandler Act (11 U. S. C. § 622) can be of no help to petitioner in the present case. As this Court stated in *Young v. Higbee Company, et al., supra*, at p. 214, "This section gives the Judge power, under conditions applicable here, to alter and modify a reorganization plan even after confirmation." Turning to this section of the Chandler Act, the significance of the word "confirmation" becomes apparent. It does authorize action after "confirmation." It does not authorize any action after a final decree of discharge.

Provision for the final decree of discharge, which is the decree described in Finding 13, R. 275, is found in Section 228 of the Chandler Act (11 U. S. C. § 628). This section was taken from former Section 207(b) of the Bankruptcy Act. It is there provided:

> "Upon the consummation of the plan, the Judge shall enter a final decree—(1) discharging the Debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the Debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property; (2) discharging the trustee, if any; (3) making such provision by way of injunction or otherwise as may be equitable; and (4) closing the estate."

The final decree of discharge complied precisely with this provision of the statute. (R. 165-167.)

Wherever the matter has been presented to the Federal Courts it has been uniformly held that after a plan of reorganization has been confirmed and the final decree has been entered closing the estate of the Debtor, with all matters reserved therein finally disposed of, the cause may not be reopened. *In re Peyton Realty Co.*, 148 F. 2d 771 (C. C. A. 3, 1945); *In re Wedgewood Hotel Co.*, 125 F. 2d 327 (C. C. A. 7, 1942); *In re Corona Radio & Television Corp.*, 102 F. 2d 959 (C. C. A. 7, 1939); *In re Argyle-Lake Shore Corp.*, 98 F. 2d 372 (C. C. A. 7, 1938). See *Prudence Corp. v. Ferris*, 323 U. S. 650, 654.

Although not an essential element to a determination of the jurisdictional question, it must be borne in mind that to grant the relief sought by Petitioner Young would constitute a complete modification of the Plan of Reorganization and a repudiation of the compromise which both the Securities and Exchange Commission and the Bankruptcy Court found to be indispensable in arriving at a fair and feasible plan. (R. 67, 68, 119.)

2. Petitioner Young and the class which he claims to represent are barred by the doctrine of res judicata by reason of the judgment which determined that Bradley and Murphy were not only the legal but also the equitable owners of the Higbee securities.

Petitioner Young asserts (pp. 2, 3 and 10 of his petition) that, by securing the dismissal of the Potts-Boag appeal, Bradley and Murphy thereby caused confirmation of the Plan of Reorganization under which they forthwith secured the Higbee securities. This is not true. The Plan itself (R. 58-9) recognizes Bradley and Murphy as two of a number of claimants to the Junior Indebtedness. Following the confirmation of the Plan several other claimants, including Petitioner Young, asserted ownership to them. Petitioner Young's controlled company, Midamerica, and others filed their claims to these securities after the

dismissal by the Circuit Court of Appeals of the so-called Potts-Boag appeal. (R. 203.) The Bankruptcy Court did not determine that Bradley and Murphy were "the legal and equitable owners" of the Higbee securities until March 16, 1943. (F. 8, R. 273-4.) The judgment, however, determining Bradley and Murphy to be the legal and equitable owners of the Higbee securities was affirmed by the Circuit Court of Appeals and a petition for writ of certiorari was denied by this Court. (F. 8, R. 274.)

All stockholders, including that class which petitioner now claims to represent, were, by operation of law and in fact, parties to the bankruptcy proceedings. Therefore, the judgment of the Bankruptcy Court determining that Bradley and Murphy were the "legal and equitable owners" of the Higbee securities and the avails thereof under the Plan of Reorganization clearly bars by way of *res judicata* all stockholders or other claimants in the bankruptcy proceedings from asserting any other claim to legal or equitable ownership of the Higbee securities. *Prudence Corp. v. Ferris,* 323 U. S. 650, 654; *Chicot County District v. Bank,* 308 U. S. 371; *Stoll v. Gottlieb,* 305 U. S. 165. As stated on page 378 of the opinion by Mr. Chief Justice Hughes in *Chicot County District v. Bank, supra*:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceedings to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well settled principle that *res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the rights asserted in the earlier proceeding 'but also as respects any other available matter which might have been presented to that end.' "

3. Petitioner Young and the class which he claims to represent are barred by the doctrine of res judicata by reason of the judgment against him and his class and in favor of Bradley and Murphy determining that Bradley and Murphy were not accountable to the Debtor or its preferred stockholders because of their purchase from Potts and Boag of the dismissal of the appeal.

The present case constitutes a second attempt which Petitioner Young, purporting to act for the same class, has made to require an accounting from Bradley and Murphy on the ground that their purchase of the Potts-Boag stock holdings and the consequent dismissal of the appeal was "a wrongful transaction in violation of the rights of the other Higbee stockholders." (R. 3, F. 9; R. 274.)

The prior attempt ended in the decision of the Circuit Court of Appeals affirming the judgment of the District Court in favor of Bradley and Murphy. (F. 10; R. 274.) Although Petitioner Young took an appeal to the Supreme Court from that judgment in so far as it related to Potts and Boag, he sought no review of the judgment in favor of Bradley and Murphy. (F. 10, R. 274.)

That the issues raised in the prior proceeding were identical with those raised in the present one is clearly apparent from a comparison of the petition in the earlier proceeding (R. 142) with the petition in the present case. (R. 2.)

The mere fact, that in one instance petitioner sought to require Bradley and Murphy to account for money they had already paid and in the other to require them to account for property and money they had received as a result of the same alleged conduct, does not prevent the operation of the doctrine of *res judicata*. The fact that a different form or measure of relief is asked in the later suit does not deprive the defendants of the protection of

the prior findings and decree in their favor. *Green v. Bogue,* 158 U. S. 478; *Baird v. U. S.*, 96 U. S. 430.

Petitioner's "Reasons for Allowance of the Writ."

Petitioner makes the contention (p. 7 of his petition) that "the decision of the lower courts in this case permits corporate officers to advance their own personal interests at the expense of the stockholders * * *." This statement is not true.

The Debtor, at a time when its board of directors had been elected solely by its preferred stockholders (R. 40, 124), formulated and filed its Plan of Reorganization by the terms of which the treatment of the "Higbee securities" then claimed to be owned by Bradley and Murphy, represented a compromise. (R. 67, 71, 119, 122.) This compromise consisted of Bradley and Murphy consenting that the junior debt (amounting to approximately $1,900,000) be recognized to the extent of $600,000 only as an obligation ahead of the preferred stock, and the balance thereof behind the preferred stock. (R. 58, 103, 122.) The compromise also included the surrender by Bradley and Murphy of all rights and claims as the holders of all of Debtor's common stock. (R. 61, 71, 102.) The ownership by Bradley and Murphy of all of the old common stock of Debtor (F. 2, R. 229; R. 243; R. 253) was not contested in the so-called Potts-Boag appeal. (R. 48 *et seq.*) The Debtor was never adjudicated insolvent. (R. 73.)

Under the Bankruptcy statutes the Court must be satisfied that a plan of reorganization is "fair and equitable" (11 U. S. C. § 621), and that it provides common stockholders with "adequate protection for the realization by them of the value of their equity" unless the Judge determines (which did not happen in this case) that the Debtor is insolvent. 11 U. S. C. § 616 (8). The determination of these questions usually "requires a prediction as

to what will occur in the future" only because "an estimate as distinguished from mathematical certitude is all that can be made." *Consolidated Rock Co. v. DuBois,* 312 U. S. 510, 526. However, in this case "a prediction as to what will occur in the future" is not required, since the value of the Debtor's property can be determined with "mathematical certitude."

The Plan of Reorganization which has now been in effect for more than five years provided for participation in the equity of the Debtor by the preferred stockholders whom Petitioner Young claims to represent. (R. 59, 60.) As a result, both old first and second preferred stockholders received securities, under the Plan, which were at the time of the trial of this case worth much more than their holdings could ever have amounted to if the Debtor had not gone into bankruptcy. (F. 14, R. 275.) All of the creditors were paid in full. (F. 14, R. 275.) Bradley and Murphy, however, did not realize the value of their equity as owners of all of the common stock of the Debtor because by reason of their compromise they shared this equity with the preferred stockholders.

It can, therefore, now be said with "mathematical certitude" that, by their purchase of the Potts-Boag appeal, Bradley and Murphy made possible the confirmation of a plan of reorganization under which they received less than a "realization by them of the value of their equity" while all other stockholders received much more. In other words, instead of corporate officers in this case having benefited their personal interests at the expense of stockholders, the stockholders' interests were actually enhanced at the expense of the corporate officers.

Respectfully submitted,

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